Supreme Court, U.S.
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No. 90-1396

In The

Supreme Court of the United States

October Term, 1990

BARNETT BANKS, INC., BIVENS CENTER, INC. LEE H. HANNA, ROBERT KOONS, THE GREAT AMERICAN BANK OF GAINESVILLE, and JAMES F. LANG,

Petitioners,

v.

FRED KONSTAND, JAMES A. KARNS, GEORGE MALIK, GEORGE MALIK, as Partner of Edward Malik, Joseph P. Malik, Malik Investment Company and Bivens Gardens Office Park, Inc.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The 11th Circuit

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QUESTION PRESENTED

Whether, as represented by Petitioners, there is a conflict amongst the various U.S. Courts of Appeal relative to the proper statute of limitations accrual rule for a civil RICO cause of action where there are multiple, independent injuries.

LIST OF PARTIES

A complete list of all parties is included in the Petition for Writ of Certiorari.

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JURISDICTION

Respondents do not contest that 28 U.S.C. § 1254(1) confers jurisdiction on this Court to consider the instant case. However, for the reasons set forth below, Respondents respectfully request this Honorable Court to decline issuance of a writ of certiorari in this matter.

STATEMENT OF THE CASE

Respondents accept the Statement of the Case related in the Petition with the following material exception.

Petitioners erroneously assert that the Eleventh Circuit Court "did not follow the *Bowling* discovery of injury rule. Instead, it adopted a two-prong 'injury plus pattern' requirement for accrual of a civil RICO action." (Petition at P.4) Petitioners also erroneously aver that, in formulating this accrual rule, the Eleventh Circuit "analyz(ed) and reject(ed) a number of the positions of the various United States Courts of Appeal". (Petition at P.4) In so doing, Petitioners suggest the ruling of the Court below constitutes a radical departure from the tenets enunciated in *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir. 1985) cert. denied, 475 U.S. 1109 (1986), *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988) and *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1642 (1989).

In fact, the Eleventh Circuit did not vitiate the *Bowling* discovery of injury rule – it was employed in all respects and merely augmented with the "discovery of pattern" criterion which had been previously established

by the *Keystone* Court. Moreover, the Court below applied relevant features of the *Bankers Trust* ruling insofar as the analysis of multiple injuries is concerned. Simple put, there is nothing novel or contradictory about the accrual rule enunciated in *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990). Rather, it is an amalgam of several decisions necessitated by the uniqueness of the facts presented, to wit, allegations of multiple, independent injuries sustained over a protracted time period.

SUMMARY OF ARGUMENT

The accrual rule adopted by the lower Court does not contradict those rules enunciated by it and the other circuit courts of appeal. Rather, it constitutes an eclectic decision which borrows from several opinions and which has application to the limited factual situation where several unrelated, independent injuries are alleged to have occurred as a result of RICO activity conducted over a protracted period of time where some of the known injuries occurred more than four years prior to commencement of the RICO action.

ARGUMENT

As stated above, and contrary to the Petitioners' suggestions, *Bivens* is not a novel opinion in conflict with other rulings on the RICO accrual issue. The uniqueness of the facts in *Bivens* compelled the Eleventh Circuit to review those decisions concerning the accrual issue and

develop an appropriate standard where several independent injuries are allegedly sustained over a protracted period of time.

The lower Court incorporated into its ruling the general proposition of *Bowling* that "a civil RICO cause of action begins to accrue when the Plaintiff knows or should have known that he had been injured." The *Bivens* Court itself, however, expressly stated that the facts of the present case, i.e., alleged multiple and independent injuries, "require us to expand on the general rule announced in *Bowling*." *Bivens* at 1555. Consequently, the Court borrowed from the Second Circuit's decision in *Bankers Trust* the "rule of separate accrual" which applies where there are multiple and separate incidents of injury. This rule provides that "each time a Plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action to recover damages based on that injury accrues to the Plaintiff at the time he discovers or should have discovered the injury." *Bankers Trust* at 1102. It should be noted here that, in an attempt to create the appearance *Bivens* constitutes a radical departure from previously established law in this area, Petitioners erroneously contend that "Bivens also introduced the concept of 'independent injury,'" (Petition at p. 10) Rather than an original concept introduced by the Eleventh Circuit, an "independent injury" is nothing more than a "separate injury" as referenced and analyzed at length in the *Bankers Trust* decision.

Similarly, there is nothing novel about the pattern criterion enunciated by the *Bivens* Court in the following rule:

> with respect to each independent injury to the Plaintiff, a civil RICO cause of action begins to accrue as soon as the Plaintiff discovers, or reasonably should have discovered, both the existence of his injury and that the injury is a part of a *pattern*.

Bivens, 906 F.2d at 1554-55 (emphasis added). This pattern element was previously defined by the Third Circuit in *Keystone* where it stated:

> Plaintiffs must not only be in a position where they know or should know of their injury, they must also be in a position where they know or should know that the predicate act causing their injury is part of a pattern of racketeering.

Keystone, 863 F.2d 1130. The pattern criterion was also addressed by this Court in *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 102 F.Ct. 2759, 97 L.Ed.2d 127 (1987). In *Agency Holding* this Court stated: "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding* at 121 (emphasis in original).

It is apparent then that the lower Court did not introduce any new theories of law in reaching its decision. Conversely, it utilized existing law developed by other circuit courts of appeal and this Court, and applied this law to the peculiar facts of the instant case. In fact, the Court below was careful to point out that it was not overhauling the body of law that had been developed in this area. Specifically, the Court enunciated its intent, and thus necessarily limited the application of the *Bivens* accrual rule, as follows:

> The present case requires us to decide the appropriate accrual rule to apply when the complaint alleges that, as the result of a conspiracy to violate RICO and substantive violations of RICO, the plaintiffs suffered several independent harms at the hands of the Defendants over a period of eight years.

Bivens 906 F.2d at 1554.

The emphasis in this case is upon the allegation of multiple independent, unrelated injuries. The Eleventh Circuit astutely noted the impropriety of the trial court's finding that "the Plaintiffs knew or should have known that any injury that had occurred had been set in motion by the last quarter of 1974 or, at the latest, the first half of 1975," i.e., commensurate with the takeover of the hotel and Konstand's filing of the state court action. The District Court improperly concluded that the three alleged injuries sustained by Plaintiff (i.e., the wrongful takeover of the hotel, the mismanagement and diversion of BCI's assets and the fraudulent sale of the hotel) all flowed from the first event of wrongful takeover of the hotel in late 1974 or early 1975, and thus were time-barred.

The Eleventh Circuit correctly concluded that the latter two alleged injuries were wholly different in kind from the first, and that in light of these "separate" or "independent injuries", the accrual rule analysis for statute of limitations purposes would have to be applied to *each* of the three alleged incidents of injury. Indeed, if one were to accept the position of the District Court and that espoused by the Petitioners, to wit, that the plaintiff's knowledge of the first injury commences the statute of limitations for a civil RICO claim to run for all purposes, a RICO act violator would have carte blanche to commit

as many RICO violations as it chooses relative to that plaintiff and be immune from prosecution so long as the first violation resulted in a known injury more than 4 years prior to the filing of plaintiff's complaint.

CONCLUSION

There is no conflict amongst the various U.S. Courts of Appeal relative to the proper statute of limitations accrual rule for a civil RICO cause of action where there are multiple, independent injuries. In the case sub judice, the Eleventh Circuit Court of Appeals was confronted with the unique factual situation of several separate or independent injuries resulting from RICO violations, some of which occurred and were known to have occurred more than four years prior to the filing of a civil RICO cause of action. In resolving the accrual issue, the Eleventh Circuit Court developed the following rule of law:

> with respect to each independent injury to the Plaintiff, a civil RICO cause of action begins to accrue as soon as the Plaintiff discovers, or reasonably should have discovered, both the existence of his injury and that the injury is part of a pattern.

Bivens, 906 F.2d at 1554-55. This rule simply utilizes the "injury plus pattern" concept developed in *Keystone* and applies this analysis to each separate alleged injury, a concept developed by the Second Circuit in the *Bankers Trust* case.

In light of the fact that there is no conflict amongst the various jurisdictions relative to the issues presented,

Respondents respectfully request this Court to decline issuance of a writ of certiorari in this case.

Respectfully submitted,

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